

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.18 OF 2004**

Ganpat Baburao Gawalgadade

...Appellant

vs.

Pune Municipal Corporation & Anr.

...Respondents.

**CORAM: A.S.OKA,J.
DATE : MARCH 9,2005.**

P.C.:

1. Heard Shri Deo for the Appellant. The Appellant is the original Plaintiff. Initially, the suit was filed by the Appellant only against the Respondent No.1-Corporation for declaration and injunction. The declaration prayed was as regards notice dated 5th August 1997 by which the Respondent No.1-Corporation called upon the Appellant to remove a shed constructed by the Appellant. The Respondent No.2 was impleaded in the suit later on. The Appellant amended the plaint and prayed for injunction restraining the Respondents from interfering with possession of the Appellant over the suit property. During the pendency of the suit, the shed was demolished by the Respondent No.1-Corporation. After the demolition the Appellant continued to prosecute the suit as against the Respondent No.2 in so far as prayer for perpetual injunction was concerned.

2. The Appellate Court has set aside the decree passed by the Trial Court for injunction against the Respondent No.2 on the ground that the Appellant admitted that he lost possession of the suit property and the plaint was not amended for claiming possession.

3. Shri Deo, learned Counsel for the Appellant submitted that

in the deposition the Appellant has not admitted that he lost possession. He submitted that averments made in the application at Exh.39 are totally in a different context.

4. The Appellate Court has relied upon the averments made by the Appellant in the Application at Exh.39 made by the Appellant in the Trial Court. In paragraph No.4 of the said application, the Appellant has asserted that by taking law in their hands the Respondent No.2, her husband and other 40 persons on 29th February 1998 assaulted the Appellant's sister and wife and demolished the suit structure and have taken over possession. In paragraph No.5 it is stated that fencing has been erected by the Respondent No.2. In paragraph No.4 at two places the Appellant has asserted that after demolition the Respondent No.2 has taken possession. In fact the prayer in the said application is for mandatory injunction directing the Respondent No.2 to restore the possession after removing the compound. In the cross examination, the Appellant admitted that whatever stated in the paragraph No.4 of the application at Exh.39 was correct.

5. In this view of the matter, when the Appellant himself came out with a case in Application at Exh.39 that he has lost possession, the suit simplicitor for injunction as against the Respondent No.2 was not maintainable. Hence, there is no merit in the Second Appeal and the same is dismissed with no order as to costs.

JUDGE.